On the Rule of Law Turn on Kirchberg – Part I

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In memory of Professor John A. Usher

What came to be generically known as “the rule of law crisis” in the European Union has led the European Court of Justice to add a new chapter to its own jurisprudential tradition. Since 2017, the Court has been laying the foundations for a jurisprudential paradigm shift in order to defend the integrity of the EU legal system and it can thereby rely on the functions that the EU Treaties confer upon it.

A Journey Through “No-Law”

Every constitutional court passes through what F. Ost called imaginatively “*un moment de non-droit*”. The place of “no-law” is defined here as a situation where there is no definitive indication in the relevant law as to how the case should be decided. “*Un moment de non-droit*” redefines a court in fundamental ways as it will weigh heavily on its image, self–perception, and role in the future. Such a situation is not about good adjudication *here and now*, but calls on a court to exhibit the craft of anticipation, reconciliation of divergent interests and true constitutional synthesis *in the days to come*. For a court to respond and move forward, it must become a tactician – and as such calculate, anticipate, plan ahead, make choices, and speak to various audiences, all at the same time. Most importantly, a court-tactician must know the limits of how far it can take its own constitutional vision and how much it can add to an incomplete legal text.

“The rule of law crisis” in the European Union, has seen the Court of Justice venture into un-chartered waters of *non-droit* and expand its jurisdictional reach into spheres once thought of as the domain of national sovereignty. Undoubtedly, each and every decision rendered between 2017 and 2019 merits close attention: from “the Portuguese judges” case to Polish “logging case”, to the European Arrest Warrant judgment (EAW), and more recently the Polish Supreme Court case (on this case law see comprehensive contributions in F. Bignami, (ed.,) *EU Law in Populist Times*, Cambridge University Press, *forthcoming*). And yet, trying to understand how the Court fills in the blank spaces opened by the encounter with “*non-droit*” requires to not just focus on the individual decisions (“boats”) but to appreciate the adjudicatory chain-novel (“journey”). The Court has been telling us important stories of how it perceives and understands itself, while unearthing new layers of the EU legal order.

New jurisprudential paradigm on the rise?

Professor Koen Lenaerts has argued that in order to honour the constitutional mandate in a self-referential, and in that sense, autonomous legal order, the Court could not have limited itself to a formalistic understanding of the rule of law. Accordingly, it had no choice but to complete the constitutional *lacunae* left by the authors of the Treaties. He distinguished three historical strands in the Court's jurisprudence: (1) defining the law and escaping formalistic understanding of the rule of law; (2) safeguarding the core of European integration; (3) upholding the checks and balances.

It is argued here that "the existential jurisprudence" of the Court builds on and adds a new chapter to the jurisprudential tradition. It is called "existential" because it aims at defending the integrity of the EU legal system. The Court is not simply deciding cases but is in the business of saving the EU from, what Pierre Pescatore once called "a disaster".

With the rule of law crisis, the Court is moving into a new paradigm. On the one hand it looks over its shoulder and marches on along Lenaert's jurisprudential strand no 1. On the other, however, it does more than that: it forges ahead with the new elements of, and the justificatory framework for, its constitutional jurisprudence.

In 2019, the Court finds itself in the unenviable situation of being trapped between what is now clearly a counter-factual assertion („values are shared") on the one hand, and the pragmatic judicial path and the mandate that binds the Court to the rule of law mast, on the other. The Court is trying to bridge the gap between the real world and reality by insisting on the trust and commonality of the values. This trust has always been built on the convergence between both the fundamental values of Member States and their legal orders and the foundations of the Union legal order. For European consensus over the core values to work, there must be agreement on fundamental commitments of principle, or what former judge of the Court Sir Professor David Edward precipitously called *First Principles*.

The existential jurisprudence enforces these essentials in the name of the EU legal order and the original consensus.

The Method

A critical observer should not limit himself to studying the "groundbreaking" case(s) but should also read the relevant previous and subsequent case-law. In accordance with the incremental approach, though, it does not only matter what the Court has decided, but equally so what the Court has left open and untouched. It is through this chain-novel that the final contours of the doctrine will emerge. The path of this case-law is incrementalism and the analysis must be holistic and global. As famously laid out by M. Shapiro some 50 years ago:

> "The core of incremental doctrine is respect for the status quo and movement from the status quo only in short, marginal steps carefully

designed to allow for further modifications in the light of further development. Incrementalism is a theory of freedom and limitation."

Shapiro's incrementalism thesis is crucial for understanding how the Court of Justice, when faced with the systemic rejection of the First Principles of the European legal order by the Member States, has been gradually uncovering, at times discovering, and defending these *Principles.*

The Court proceeds incrementally, aware of both the opportunities and limitations that the new constitutional politics in Europe entail. From small-step balancing develops a large-scale change. Evolution must always follow revolution and conversely revolutionary change might evolve over time before its final shape comes into full view. New argumentative frameworks are built around some general precepts enunciated in the first decision. When the time is right, the case will be built and reconstructed so as to set off and frame the chain-novel. Evolution will follow revolution, even though at the time of the events not too many may realise that the ground work for the latter is being laid down before their eyes.

Stage *one* is waiting for the right case. Stage *two* lays down a principle. However, simple enunciation of the principle will never suffice. The Court must calibrate and recalibrate „*a principle*" before it becomes „*the principle*". Thus, stage *three* unveils the consequences and delimits the scope of a principle which will eventually determine the content of the principle. Stage *Three* slides then seamlessly into stage *four* of case-by-case application. In the end, we meet the new doctrine a of fully-fledged principle. This is where we are at right now. By proceeding step-by-step, the Court neither limits itself to questions that are asked, nor refuses to engage with the arguments that *prima faci*e seem unnecessary for the resolution of a controversy at hand. Rather, the Court is responsible for framing the argument and the terms of engagement. The "Portuguese judges case" illustrates this revolutionary mood where it was not necessary for the Court to answer the questions it was asked in such broad constitutional brushes. The concrete *result* took backstage to abstract constitutional *doctrine.* While the result was subsumed by the case and the decision, the contours of the doctrine were on purpose far from clear. In line with the incremental approach, the Court was just embarking on a journey in search of a right balance between the *status quo* and the necessary change. It was in full control of where and how it wanted to take the incipient doctrine further and start building on *a principle* before it becomes *the principle*.

The incrementalism is nowhere better seen than in the subtle interaction between two leading judgments in the Court's rule of law chain-novel: the *Portuguese Judges* case and the *European Arrest Warrant* (EAW) case. The former (and earlier) provides a solid jurisprudential ground for the latter and when read together both create an inescapable logic in the Court's reasoning: *First step*: the independence of the judiciary is an *essence* of the fundamental right to a fair trial (para. 48 *EAW*). The right to a fair trial, in turn, serves as a guarantor that all the rights of individuals stemming from EU law are protected and that the values common to the Member States set out in article 2 TEU – in particular the value of the rule of law – will be safeguarded. *Second step:* the very existence of effective judicial review designed to ensure compliance with EU law is *essential* for the rule of law (para. 36 of the

Portuguese Judges case and para. 51 *EAW*). *Third step*: the duty of every Member State to ensure that the courts meet the requirements *essential* to effective judicial protection in accordance with art. 19 TEU (para. 40 of the *Portuguese Judges* case and paras 53-54 of *EAW* case). *Fourth step:* for judicial protection to be effective, maintaining the independence of national courts is *essential* (para. 41 of the *Portuguese Judges* case and para. 53 of *EAW*). *Fifth step:* ensuring the essential freedom from external interventions or pressure on the judiciary that would impair the independent judgment and influence the decisions taken by the members of the court (para. 44 of the *Portuguese Judges* case and developed in paras. 63-64 of *EAW*).

By introducing and then repeating over and over the novel terms “essence” and “essential”, the Court speaks the meta-language of identity and specificity of the EU legal order. Judicial independence as such is not an intrinsic value, rather it is instrumental to ensure the observance of a first-order right that is the right to a fair trial. The link between that right and “all other rights” clearly refers to the most cherished of all doctrines – direct effect. By putting this procedural right at the service of protecting the direct effect of the EU, the Court draws on the constitutional language of *Van Gend en Loos* (without mentioning it). And last but not least: the critical conclusions of the interaction just sketched out have been drawn in the Court’s order of 19 October 2018, (C – 619/18, *Commission v Poland*, and since then confirmed by the Grand Chamber on 17 December 2018) where the Court, ruling in favour of the Commission, referred to paragraph 48 of the *EAW* case.

This is a textbook path of how *a principle* becomes *the principle*.

The Theme: “Union of law”

Art. 19 TEU is the heart and soul of this existential jurisprudence. The journey of the Court clearly shows that art. 19 TEU plays many, and often at the same time, systemic functions. Six should be mentioned here.

First, it moves the Union from power-oriented to rule-oriented politics. Second, it stands for “the Union legality”, understood as an idea of law as understood within the Union legal order. Third, it empowers the Court, and delimits its jurisdiction at the same time or, using Pescatorian terms, it defines “normative space within which the Court exercises its judicial power”. The normative space of art. 19 TEU is defined as ensuring the observance of law in the interpretation and application of the Treaty. While this language is extremely open-ended, the element of constraint is nonetheless clearly there. Four, it expresses the fundamental idea of judicial protection which allows the Court to interpret the jurisdictional clauses in a manner that is coherent and constructive. Five, it underscores that the courts of the Union are courts of law and that the Union is governed by the rule of law. Art. 19 TEU does more than just define, though. Therefore, and six, it describes the mission of the Court within the framework of the separation of powers set up by art. 5(2) TEU according to which each institution acts within the limits of the powers conferred on it. In that sense, art. 19 TEU forms part of the Treaty competence framework. Even

though art. 19(1) is not read as a jurisdictional clause (in the sense of jurisdiction-conferring), its role is much more important and goes beyond this aspect.

Art. 19 TEU serves as an independent, albeit of particular nature, head of jurisdiction of the Court. The task of ensuring the observance of the law contains the fundamental and basic feature, namely that the Union is based on the rule of law. The law must be observed by both the Member States and the institutions and the Court is there to make sure that this is more than just an elegant exhortation. To this end, it disposes of the *jurisdiction conferred* (starting with art. 258 TFEU) and *the implied jurisdiction.* The latter is reserved for exceptional situations and used as a tool to complement the former. One would be wrong to assume, though, that resort to the implied jurisdiction as expressed in Art. 19 TEU becomes a daily occurrence. The fact that the Union is based on the rule of law constitutes the premise on which the Court is ready to modify (Court's critics view) or enrich (Court's proponents view) its jurisdiction in order to make sure that there exists a complete system of legal remedies and procedures within the Union. The identification of a gap in a system is not enough for the Court to fill it by relying on its implied jurisdiction. In each and every case the Court will evaluate whether the need to fill a gap is justified by some pressing interests and principles worthy of protection (respect for institutional balance, effective cooperation with national courts, coherent system of legal protection, and now the rule of law, effective judicial review whose essence is the rule of law, independence of the judges). If the scales fall in favour of such judicial intervention, the implied jurisdiction will come into play.

Former Judge of the Court K. Kakouris spoke of the judge's mission by which he understood bringing coherence to the principles and rules and establishing an order of preference among them. Such an exercise contributes to the reconstruction of the normative system instead of its deconstruction. The Court is choosing a superior principle in the light of which it decides to resolve the case. The internal differentiation that follows establishes a hierarchy between constitutional norms and values. As a result, not all the Treaty provisions are at the same level of normativity. Some are technical, others play a fundamental (existential) role. In case of conflict, the most important provision, the principal rule, has to be followed. The ensuing super-constitutionality becomes a governing mechanism for ordaining the norms and values within the Treaty framework. Among such fundamental principles, effective judicial protection and review, rule of law, and judicial independence play a primordial role and have the potential to trump others in case of conflict. The Court's existential jurisprudence brings them under one umbrella of art. 19 TEU. This provision glues the Court's cases into a coherent doctrine and helps the Court move on to a new paradigm: existential jurisprudence. Therefore, the most crucial point is to see and understand that adjudicating the jurisdictional issues is not a pure automatic process. The Court's jurisdictional choice is always preceded by some difficult trade-off between competing interests and principles.

Knowing the methods and the main themes that drive the Court invites us to consider the most crucial question: what next for the Court and its judicial forays into the sphere of "*non-droit*"?